

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SANDY VAN, an individual; JUDY VAN, an individual,

2:15-cv-01401-JAD-PAL

Plaintiffs

Order Denying Ex Parte Application for Temporary Restraining Order

ASSET VENTURES, LLC, a California limited-liability company; ANTHONY MARTINEZ, an individual; JBY FINANCIAL, LLC, a Colorado limited-liability company,

[ECF 13]

Defendants

Sandy Van and Judy Van move ex parte for a temporary restraining order and an order to show cause why a preliminary injunction should not issue against Asset Ventures, LLC, Anthony Martinez, and JBY Financial, LLC (JBY).¹ Having reviewed the first amended complaint,² motion and memorandum of points and authorities, supporting declaration, and exhibits,³ I find that the Vans have not met the standard for obtaining a temporary restraining order without notice, or even at all. Most significantly, the Vans failed to demonstrate that they are likely to suffer irreparable harm if not granted temporary injunctive relief. I thus deny the motion in its entirety.

Background

The Vans sue Asset Ventures and Martinez for breach of contract, fraud, breach of fiduciary duty, conversion, unjust enrichment, and fraudulent conveyance, and they sue JBY for unjust

¹ ECF 13.

² ECF 6. Although the amended complaint references two exhibits, they are not attached to that document. See ECF 6. Those exhibits, however, appear to be attached to plaintiffs' original complaint. See ECF 1 at 19–31.

3 ECF 13

1 enrichment and fraudulent conveyance.⁴ It appears that the Vans' original complaint was served on
 2 Asset Ventures and Martinez on August 3, 2015.⁵ Asset Ventures and Martinez were then served
 3 with the amended complaint via U.S. mail on August 19, 2015.⁶ The record reflects that JBY has not
 4 yet been formally served with summons or the amended complaint.⁷

5 **Discussion**

6 **A. Standard to Obtain Temporary Injunctive Relief Without Notice**

7 District courts "may issue a temporary restraining order without written or oral notice to the
 8 adverse party or its attorney" only when "specific facts in an affidavit or a verified complaint clearly
 9 show that immediate and irreparable injury, loss or damage will result to the movant before the
 10 adverse party can be heard in opposition" **and** "the movant's attorney certifies in writing any efforts
 11 made to give notice and the reasons why it should not be required."⁸ The Vans have not met this
 12 standard.

13 Neither of the Vans' complaints is verified.⁹ Sandy Van does attest in her declaration that
 14 she and Judy Van will be harmed if defendants are not restrained from selling certain real property,
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16 ⁴ ECF 6. The Vans also sue these defendants for injunctive relief and Asset Ventures and Martinez
 17 for appointment of a receiver. But "[a] request for injunctive relief by itself does not state a cause
 18 of action. . . ." *Jensen v. Quality Loan Serv. Corp.*, 702 F.Supp. 2d 1183, 1201 (E.D. Cal. 2010)
 19 (collecting authorities). And the appointment of a receiver "is an extraordinary equitable
 20 remedy," rather than an independent cause of action. *See Canada Life Assur. Co. v. LaPeter*, 563
 21 F.3d 837, 844 (9th Cir. 2009) (quoting *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d
 314, 316 (8th Cir. 1993); 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal
 Practice and Procedure* § 2983 at 24 (2d ed. 1997)).

22 ⁵ ECF 10, 11.

23 ⁶ ECF 12.

24 ⁷ JBY was added as a defendant in the Vans' amended complaint. Sandy Van attests that William
 25 Curran Cisney, the principal of JBY, contacted her on August 25, 2015, and "acknowledged receipt
 26 of the operative pleading [that] named his company as a Defendant." ECF 13 at 16 ¶ 17. No
 affidavit of service on JBY has been filed.

27 ⁸ FED. R. CIV. PROC. 65(b)(1).

28 ⁹ *See* ECF 1, 6.

1 but, for the reasons discussed below, I find that the Vans' evidence is insufficient and the harm that
 2 they identify is speculative. Moreover, the Vans' attorney has not provided the certification required
 3 under FRCP 65(b)(1)(B) of any efforts that were made to give notice of the application to the adverse
 4 parties and why it should not be required. Based on this record, I find that the Vans have not met the
 5 requirement for obtaining preliminary injunctive relief without notice to the adverse parties.

6 **B. Standard to Obtain Temporary Injunctive Relief**

7 The legal standard for issuing a temporary restraining order and the legal standard for
 8 preliminary injunctive relief are "substantially identical."¹⁰ In *Winter v. Natural Resources Defense*
 9 *Council, Inc.*, the Supreme Court clarified that the standards "require[] a party to demonstrate 'that
 10 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 11 preliminary relief, that the balance of equities tips in his favor, and that [a temporary restraining
 12 order] is in the public interest.'"¹¹ "[I]f a plaintiff can only show that there are 'serious questions
 13 going to the merits'—a lesser showing than likelihood of success on the merits—then a preliminary
 14 injunction may still issue if the 'balance of hardships tips sharply in the plaintiff's favor,' and the
 15 other two *Winter* factors are satisfied."¹²

16 The second *Winter* factor requires the Vans to demonstrate that they are likely to suffer
 17 irreparable harm if not granted a temporary restraining order. "Irreparable harm is traditionally
 18 defined as harm for which there is no adequate legal remedy, such as an award of damages."¹³ The
 19 Ninth Circuit instructed in *In re Estate of Ferdinand Marcos, Human Rights Litig.* that district courts
 20 have authority to issue preliminary injunctive relief in situations where only money damages are
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22 ¹⁰ See *Stuhlbarg Intern. Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001)
 23 (stating that the "analysis is substantially identical for the injunction and the TRO").

24 ¹¹ *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Natural Res.*
 25 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

26 ¹² *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting with
 27 emphasis *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

28 ¹³ *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (citing *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)).

1 sought but those damages would be inadequate due to a defendant's impending insolvency.¹⁴ The
 2 Ninth Circuit, however, expressly "restricted" its holding "to only *extraordinary* cases in which
 3 equitable relief is not sought" in order to "avoid[] the concern . . . of the 'sweeping effect' that a
 4 plaintiff in any action requesting damages can apply for an injunction to sequester his or her
 5 opponent's assets."¹⁵

6 "Those seeking injunctive relief" must do more than just state or argue that they will suffer
 7 irreparable harm, they "must proffer evidence sufficient to establish a likelihood of irreparable
 8 harm."¹⁶ To support their irreparable-harm argument, the Vans submit the declaration of Sandy Van
 9 and an exhibit purporting to be a list of properties owned by Asset Ventures.¹⁷ Sandy Van attests
 10 that if the defendants are not prohibited from selling certain real property, she and Judy Van will be
 11 harmed by being unable to enforce a judgment against the defendants.¹⁸ But the Vans did not submit
 12 any evidence of the financial condition of Asset Ventures or tending to show that those properties are
 13 Asset Ventures's sole assets against which the Vans could execute if they prevail in this action. The
 14 Vans did not submit any evidence showing that they personally have an interest in the properties.
 15 And they offered no evidence of the financial condition of the other defendants, Martinez and JBY.

16 Yet another deficiency in the Vans' request is that their evidence does not demonstrate that
 17 Asset Ventures actually has or had ownership interest in the subject properties. Sandy Van attests
 18 she "discovered that Asset Ventures, LLC owned these properties [identified on Exhibit A] through
 19 conducting a nationwide title search."¹⁹ There is, however, no evidence that Sandy Van is competent

21 ¹⁴ *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1476–80 (9th Cir. 1994)
 22 (*Estate of Ferdinand Marcos*).

23 ¹⁵ *Id.* at 1480 (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 222–23
 24 (1945)).

25 ¹⁶ *Herb Reed Enter., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1251 (9th Cir. 2013), *cert. denied*, 135 S.Ct. 57 (2014).

26 ¹⁷ ECF 13 at 13–19.

27 ¹⁸ ECF 13 at 17 ¶ 19.

28 ¹⁹ ECF 13 at 13 ¶ 1.

1 to conduct a title search. Her declaration lacks any details about the search that she performed, e.g.,
 2 when she performed the search or how she did it.²⁰ And instead of submitting title reports or similar
 3 documents evidencing Asset Ventures' supposed ownership interest, the Vans submitted a self-made
 4 list that purports to provide "Properties Owned by Asset Ventures, LLC."²¹ The Vans' evidence is
 5 not sufficient to demonstrate the deepening insolvency of any defendant or a pattern of secreting or
 6 dissipating assets to avoid judgment by any defendant of the type that led the Ninth Circuit in *Estate*
 7 *of Ferdinand Marcos* to hold that the irreparable-harm requirement may be satisfied in very limited
 8 circumstances even if money damages are sought.

9 The Ninth Circuit expressly "restricted" its holding in *Estate of Ferdinand Marcos* to "only
 10 *extraordinary* cases in which equitable relief is **not** sought."²² But the Vans seek equitable relief
 11 with their fraudulent transfer claim: to void and rescind the transfer of real property in Virginia from
 12 Asset Ventures to JBY.²³ As the Nevada Supreme Court recently explained in *Cadle Co. v. Woods &*
 13 *Erickson, LLP*, "[c]reditors do not possess *legal* claims for damages when they are victims of
 14 fraudulent transfers. Instead, creditors have recourse in *equitable* proceedings in order to recover the
 15 property, or payment for its value, by which they are returned to their pre-transfer position."²⁴
 16 "Nevada's fraudulent transfer statute creates equitable remedies including avoidance, attachment,
 17 and, subject to principles of equity and the rules of civil procedure, injunction, receivership, or other
 18 relief."²⁵ Because the Vans seek equitable relief with their fraudulent transfer claim, the narrow
 19 holding of *Estate of Ferdinand Marcos* does not apply in this action.

20 Based on this record, I find that the Vans have not demonstrated that they will be irreparably
 21 harmed—as that term is understood in Ninth Circuit law—if the defendants are not preliminarily

22 ²⁰ See ECF 13 at 13–17.

23 ²¹ ECF 13 at 19.

24 ²² *Estate of Ferdinand Marcos*, 25 F.3d at 1480 (emphasis in bold added).

25 ²³ ECF 6 at ¶ 60–61.

26 ²⁴ *Cadle Co. v. Woods & Erickson, LLP*, 345 P.3d 1049, 1053 (Nev. 2015).

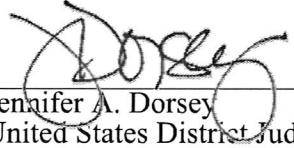
27 ²⁵ *Id.* (citing NEV. REV. STAT. § 112.210).

1 restrained from selling, encumbering, or otherwise disposing of the properties identified by plaintiffs.
2 Because the test for preliminary injunctive relief requires satisfaction of all four *Winter* factors,
3 failure to satisfy any one of them—as the Vans have failed to demonstrate likelihood of irreparable
4 harm here—requires denial of the request for a temporary restraining order.

5 **Conclusion**

6 Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Vans' ex
7 parte application for a temporary restraining order and request for an order to show cause why a
8 preliminary injunction should not issue [ECF 13] is **DENIED**.

9 Dated this 8th day of September, 2015.

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11 Jennifer A. Dorsey
United States District Judge

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